

No. 14,895 /

IN THE
**United States Court of Appeals
For the Ninth Circuit**

HENRY C. SIMPSON,

Appellant,

vs.

HARLEY O. TEETS, Warden, California
State Prison, San Quentin, California,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLEE'S BRIEF.

EDMUND G. BROWN,

Attorney General of the State of California,

CLARENCE A. LINN,

Assistant Attorney General of the State of California,

ARLO E. SMITH,

Deputy Attorney General of the State of California,

600 State Building, San Francisco 2, California,

Attorney for Appellee.

FILED

DEC 30 1955

PAUL P. O'SIEN, Clerk

Subject Index

	Page
Statement of the case.....	1
Summary of argument.....	3
Argument	4
I. The appellant has not exhausted his state remedies as is required by 28 U.S.C.A. 254.....	4
II. The California Supreme Court on consideration of the record and the facts within its knowledge properly disbelieved the allegations of the petition, and the United States District Court properly relied on the California Supreme Court's determination.....	10
III. In the event the Federal District Court properly denied the petition because the petition did not suffi- ciently allege facts to show that the appellant had been denied any right under the United States Con- stitution	11
Conclusion	12

Table of Authorities Cited

Cases	Pages
Brown v. Allen, 344 U.S. 443.....	9, 10
Buchanan v. O'Brien, 181 F. 2d 601 (1st Cir., 1950).....	9
In re Chessman, 35 Cal. 2d 455.....	4
In re Mooney, 10 Cal. 2d 1.....	4
In re Razutis, 35 Cal. 2d 532.....	5
In re Swain, 34 Cal. 2d 300.....	5, 8
People v. Bronaugh, 100 Cal. App. 2d 220.....	5
People v. Simpson, 43 Cal. 2d 553.....	2, 6, 7
United States ex rel. Calvin v. Cloudy, 95 Fed. Supp. 732 (D.C. N., 1951).....	9
Willis v. Utecht, 185 Fed. 2d 810 (8th Cir., 1950).....	9

Statutes

28 U.S.C.A. 254.....	3, 4
----------------------	------

No. 14,895

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HENRY C. SIMPSON,

Appellant,

vs.

HARLEY O. TEETS, Warden, California
State Prison, San Quentin, California,

Appellee.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

Henry C. Simpson and Clarence Simpson were jointly charged by indictment with the murder of Vivian Simpson on or about March 10, 1953. Clarence Simpson, being 13 years of age, was certified to the Juvenile Court. Defendant pleaded not guilty and not guilty by reason of insanity. After a jury trial he was found guilty of murder in the first degree, without recommendation; he was also found sane at the

time the crime was committed. The prosecutions' theory was that Henry Simpson counseled, advised and encouraged his 13 year old son, Clarence Simpson, to kill Vivian Simpson, wife of Henry and mother of Clarence; that such crime was a result of premeditation and planning over a period of time on the part of Henry, Clarence, and a 14 year old school friend of Clarence, one Jimmy Jones.

Petitioner's appeal to the California Supreme Court was automatic. The Supreme Court appointed counsel to represent petitioner on the appeal. The California Supreme Court affirmed the judgment in the case reported as *People v. Simpson*, 43 Cal. 2d 553. This opinion was handed down in October, 1954.

It was not until February, 1955, that petitioner filed a writ of habeas corpus in any court. Petitioner filed first in the California Supreme Court. While this petition was pending, he filed a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division. This petition was denied on the ground that he had not exhausted his remedies under the laws of California and that no facts were stated that would constitute a cause for relief. On February 22, the California Supreme Court denied petitioner's first application to that Court.

On Wednesday, February 23, 1955 petitioner's present counsel was appointed. On February 24, said counsel filed a petition for a writ of habeas corpus in the United States District Court, Northern District of California, Southern Division. The petition in the

District Court was tentatively denied on the ground that petitioner had not exhausted his State remedies, that he had not complied with the procedural rules governing applications for writs of habeas corpus set down by the California Supreme Court. Petitioner's attorney then filed a second petition on the same date, February 24, in the California Supreme Court. The petition was denied on the same date. Thereafter, the United States District Court granted a stay of execution pending determination of petitioner's request for a writ of certiorari. The petition for a writ of certiorari was thereafter denied by the United States Supreme Court.

On July 5, 1955, the United States District Court denied the petition on the ground that the Supreme Court of California fully and adequately considered the matters presented; that the Courts of the State of California had afforded petitioner due process of law; and that his contentions appeared to be without merit. Notice of appeal was filed on July 27, 1955, and a certificate of probable cause was granted and an order staying execution made on August 3, 1955.

SUMMARY OF ARGUMENT.

- I. The appellant has not exhausted his State remedies as is required by 28 U.S.C.A. 254.
- II. The California Supreme Court on consideration of the record and the facts within its knowledge properly disbeliefled the allegations of the petition, and the United States District Court prop-

erly relied on the California Supreme Court's determination.

- III. In any event the Federal District Court properly denied the petition because the petition did not sufficiently allege facts to show that the appellant had been denied any right under the United States Constitution.
-

ARGUMENT.

I. THE APPELLANT HAS NOT EXHAUSTED HIS STATE REMEDIES AS IS REQUIRED BY 28 U.S.C.A. 254.

Petitioner has not complied with the California procedural rules requiring that the petitioner for a writ of habeas corpus allege with particularity the facts upon which he relies to overturn the judgment; he has thus not properly sought to invoke the corrective process of the State of California. A petitioner cannot exhaust his State remedy by the simple expedient of wilfully or negligently failing to present a proper petition in the State Court.

Petitioner's allegations are two-fold. First, he alleges the California Supreme Court was furnished with a false transcript of testimony upon which it determined the appeal, and, secondly, that the prosecutor knowingly used perjured testimony. California Courts provide remedies for both of these situations. See *In re Mooney*, 10 Cal. 2d 1; *In re Chessman*, 35 Cal. 2d 455.

The California Supreme Court has set forth procedural rules requiring specific allegations of fact to

establish a cause for relief. This rule does not require any technical preciseness; it simply requires a frank disclosure of the facts. This rule requires one who seeks to show his conviction was obtained by the prosecution's knowing use of perjured testimony or by a false record on appeal, to designate specifically the precise testimony which it is asserted was perjured or false, state in detail what the actual facts are, and name or otherwise identify the persons connected with the prosecution who knew it was perjured or false and persisted in using it, state also the circumstances establishing such person's knowledge of the fact. Likewise, this rule requires a showing of the materiality of the matter perjured or omitted from the record. Also, it requires petitioner to state the facts which establish that the petitioner did not have the opportunity to present the matters at the trial or on appeal. Stating this in another way, the rule requires an explanation of the delay in raising the matter. See *In re Swain*, 34 Cal. 2d, 300; *In re Razutis*, 35 Cal. 2d 532; *People v. Bronaugh*, 100 Cal. App. 2d 220, at 224.

The petition filed by petitioner's *attorney* in the California Supreme Court did not comply with these rules.

The allegation concerning the faulty record on appeal does not designate precisely the false testimony. Likewise, petitioner does not allege a knowing presentation of a false record on the part of the Court reporter or other persons, i.e., the petition does not identify the persons responsible for the false record.

Likewise, petitioner does not indicate the materiality of the alleged false testimony included in the record. A comparison of the allegations in the petition filed in the District Court with the California Supreme Court opinion, *People v. Simpson*, 43 Cal. 2d 553, shows that the testimony was immaterial. In order to establish a violation of due process by the presentation of a faulty record on appeal, it would appear that the testimony alleged to have been added would have to be material and prejudicial. The testimony would have to be of such a character as to have influenced the decision of the Appellate Court. No such showing has been made.

Furthermore, it is noteworthy that this question was not raised at the time the appeal was pending nor in the four months subsequent to the decision of the California Supreme Court; apparently it is a brain-child of one of petitioner's better known associates on death row.

The allegation of knowing use of perjured testimony is likewise insufficient. The allegation may be divided into two parts: Knowing use of perjured testimony of petitioner's stepson (Donald Dodge), and false testimony of certain other individuals due to intimidation by the prosecutor.

The allegation concerning false testimony by certain witnesses intimidated by the prosecutor is insufficient; the petition does not specify the precise testimony which was assertedly perjured, nor does petitioner name or otherwise identify the person connected with the prosecution who knew it was perjured

and insisted on using it. Nor is there an allegation that petitioner did not know at the trial that such testimony was perjured, or that he lacked the opportunity to present these matters at the trial. Likewise, there is no explanation for petitioner's delay in raising this question.

The allegation that petitioner's stepson's testimony was perjured at the solicitation of the prosecutor is likewise insufficient. First, the petition does not allege such testimony was perjured or that the prosecutor knew it was perjured. Petitioner does not specify the perjured testimony, nor does he point out the materiality of the stepson's testimony. Incidentally, a reading of the California Supreme Court's opinion, *People v. Simpson*, 43 Cal. 2d 533, shows that the primary witness for the prosecution was one Jimmy Jones. Although the testimony of Donald Dodge was corroborative testimony, the Court pointed out that defendant's inconsistent statements in themselves constituted corroboration.

Furthermore, there is no allegation that petitioner did not know the facts concerning the testimony of Donald Dodge at the trial and that thus he did not have an opportunity to present the truth at the trial. Likewise, there is no explanation of the delay of a period of months before raising this objection to the stepson's testimony. Of course, waiting until the eve of a scheduled execution may be a shrewd defense tactic. This often used technique is designed to and does place great psychological pressure on judges to grant stays of execution.

The orderly, equal, and just administration of criminal law requires that petitioners be required to raise all objections at the earliest possible moment. He should not be permitted to reserve a case for later use.

The California Supreme Court in the case of *In re Swain*, 34 Cal.2d 300, at 303-304, sums up the rule and the justification for the rule as follows:

“... (O)ur determination that the vague, conclusionary allegations in the present petition are insufficient to warrant issuance of the writ is not a ruling on the merits of the issues which petitioner has attempted to raise (citations omitted). We are entitled to and we do require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts. This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation.”

Indeed, here *petitioner had counsel*, who conferred with petitioner, and presumably was aware of the California procedural rules. Nevertheless, counsel made no real effort to comply with them. Until he has submitted a petition that conforms to the State procedural requirements, he has not exhausted his State remedy. No exceptional circumstances are alleged to obviate the necessity for exhaustion of State

remedies. The petition was, therefore, properly dismissed.

Indeed, it is well settled that there can be no exhaustion of State remedies until there has been submitted a petition that conforms to State procedural requirements.

Buchanan v. O'Brien, 181 F. 2d 601 (1st Cir., 1950);

Willis v. Utecht, 185 Fed. 2d 810 (8th Cir., 1950);

United States ex rel. Calvin v. Cloudy, 95 Fed. Supp. 732 (D.C. N., 1951).

The United States Supreme Court has stated this rule in the case of *Brown v. Allen*, 344 U.S. 443, at 458, as follows:

“. . . So far as weight to be given to the proceedings in the courts of the state is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. *A fortiori*, where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed.”

II. THE CALIFORNIA SUPREME COURT ON CONSIDERATION OF THE RECORD AND THE FACTS WITHIN ITS KNOWLEDGE PROPERLY DISBELIEVED THE ALLEGATIONS OF THE PETITION, AND THE UNITED STATES DISTRICT COURT PROPERLY RELIED ON THE CALIFORNIA SUPREME COURT'S DETERMINATION.

Assuming for the purposes of discussion that the California Supreme Court overlooked the failure to comply with the procedural rule, nevertheless the petition was properly denied by the California Supreme Court.

The record of the proceedings in this case shows that petitioner was represented by able counsel at trial, and that the California Supreme Court appointed highly competent counsel to represent him on his appeal to the Supreme Court. Said counsel read the record, conferred with the trial counsel and petitioner while handling the appeal in the California Supreme Court. Certainly, if the record were defective or any fact showing use of perjured testimony was known to either the trial counsel or the appellate counsel, these matters would have been raised. If petitioner was aware of these facts, he could have and should have informed his trial counsel and his appellate counsel in order that they might have raised these questions. It is evident that the California Supreme Court has carefully protected defendant's rights.

The United States District Court could properly rely on the California Supreme Court's consideration of the record and the facts within its knowledge in denying the petition. (*Brown v. Allen*, 344 U.S. 443, 458.)

III. IN THE EVENT THE FEDERAL DISTRICT COURT PROPERLY DENIED THE PETITION BECAUSE THE PETITION DID NOT SUFFICIENTLY ALLEGE FACTS TO SHOW THAT THE APPELLANT HAD BEEN DENIED ANY RIGHT UNDER THE UNITED STATES CONSTITUTION.

The petition does not allege that perjured testimony was knowingly used. The petition simply alleges that a certain witness was told that if he testified he would be given a car and that if he failed to testify he would be prosecuted. Such an allegation does not allege that such testimony was perjured, nor does such a statement allege that the district attorney knew that such testimony was perjured.

Appellant's brief makes much of the fact that this petition was hand drafted. However, his own statement of events indicates that he consulted with petitioner prior to the filing of said petition; that said petition was drafted with the aid and assistance of counsel. Certainly, petitioner's counsel had adequate opportunity to re-frame and to add to the petition before it was filed in the District Court and in the California Supreme Court. The petitioner had the aid of counsel for a period of approximately four months before the United States District Court acted upon this petition. No attempt was made by petitioner's counsel to add to and clarify the allegations of this petition.

The conclusionary allegations of the petition are indeed grave matters. If petitioner's allegations are true, the prosecutor, perhaps the court reporter, are guilty of a conspiracy to commit murder, which in California is punishable by death. Certainly, a frank dis-

closure of the factual situations upon which a petitioner relies in such a case is most reasonable.

CONCLUSION.

It is respectfully submitted that the dismissal of the petition by the Federal District Court be affirmed.

Dated, San Francisco, California,
December 27, 1955.

Respectfully submitted,
EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
Attorneys for Appellee.